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In The

# Supreme Court of the United States

October Term, 1988

DOW JONES & COMPANY, INC., CBS INC., NATIONAL BROADCASTING COMPANY, INC., THE ASSOCIATED PRESS, and NEWSDAY, INC.,

*Petitioners,*

v.

STANLEY SIMON, *et al.*,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## COUNTERSTATEMENT OF THE CASE

Respondent Stanley Simon opposes the petition for a writ of certiorari for review of the judgment of the United States Court of Appeals of the Second Circuit in this case. The Court should not tarry to decide the fate of the so-called "gag order": not only because the First Amendment claims are without merit and the opinion of the Court of Appeals is in accord with decisions of this Court and other Circuit Courts, but also because petitioners (corporations in the business of publishing and broadcasting the news) slept on their rights and did not come to the Court while the trial of the case was before the jury and the appeal had some meaning to Mr. Simon.

The petitioning news companies appealed to the Court of Appeals from an order entered on July 10, 1987, by District Judge John M. Cannella in the Southern District of New York, 664 F. Supp. 780 (S.D.N.Y. 1987) ("the July 10 order") and a subsequent order of District Judge Constance Baker Motley denying reargument (unreported).[1] The July 10 order of the District Court at issue, captioned *United States v. Stanley Simon, et al.*, No. SSSS 87 Cr. 265 (CBM) (S.D.N.Y. 1987), limited what the parties in that case and their lawyers and agents could say to people associated with the news media or those close to them. The government took no appeal from the July 10 order.

At the time that the Second Circuit affirmed the July 10 order, reported at 842 F.2d 603 (2d Cir. 1988), on March

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[1] All of the opinions for the case have been reproduced in the Appendix of the petitioners' brief.

14, 1988, the criminal trial was just underway. It went on for five months – until August 4, 1988, when the jury reached its verdict and six of the defendants, including Stanley Simon, were convicted. The news companies did not file their certiorari brief until the very last day that they could – coincidently the date of the jury verdict.[2] On that same day, the Government asked the District Court to lift the restraining order in open court. The defendants did not oppose. The order was lifted instantly.

Accordingly, there is no longer a controversy involving defendants over the July 10 order. For Stanley Simon, the issues here are moot. And every dollar he has must be channeled to his appeal.

We submitted a letter on August 30, 1988, stating our opposition to certiorari on the grounds of practical mootness and on the equities. The Court has, however, asked for a response. As a courtesy to the Court, we do so. To save expenses, we have printed extracts from our Court of Appeals brief on the merits of the July 10 order and ask the Court's indulgence.

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[2] The petition for Rehearing and Suggestion for Rehearing *en banc* was denied on May 6, 1988 – three months before the petitioners filed a brief for a writ of certiorari.



## ARGUMENT

### 1.

**Certiorari should be denied as a matter of fairness: petitioners slept on their rights and it would be unfair to burden Mr. Simon or his counsel with the expense of an appeal to this Court.**

The equities, which are relevant to the equitable writ of certiorari, scream for a denial of the writ – because of laches and an unfair financial burden.[3]

Although "termination of the underlying criminal proceeding by a guilty plea . . . or by a jury verdict nearly always will lead to a lifting of [a restraining] order before appellate review is completed," *Gannett Co. v. Depasquale*, 443 U.S. 368, 377 (1979), that was not the case here. The news companies simply did not exercise due diligence. Unlike criminal trials of brief duration, trials with short

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[3] Even the procedural rules adopted by this Court can be changed to take the equities into consideration when the ends of justice so require. *See Schacht v. United States*, 398 U.S. 58 (1970) (late petition for certiorari granted where petitioner had acted in good faith and the delay in filing his petition for certiorari was brought about by circumstances largely beyond his control); *see also Felix v. Superior Court of Pima*, 92 Ariz. 247, 250, 375 P.2d 730, 732 (1962) (courts have "universally recognized that in a proper case the doctrine of laches may be applied to bar the remedy of certiorari"); *Iannella v. Johnson*, 136 N.J.L. 514, 517, 56 A.2d 894, 896 (N.J.), *aff'd*, 137 N.J.L. 659, 61 A.2d 237 (N.J. 1948), *appeal dismissed*, 336 U.S. 932 (1949) (" 'While there is no hard and fixed rule that can be laid down for a guidance on the subject-matter of laches, nevertheless, when one seeks to invoke the discretion of the court to grant the extraordinary writ of certiorari, he must prosecute his claims with due diligence.' ") (citation omitted).

life spans that have presented this Court with a good reason for granting review because of the time it takes to appeal a case,[4] this trial lasted five months. Never within that five-month period did the petitioning news companies ask for relief from this Court in any way. No petition. No motion for a stay. No application for accelerated consideration. Not a step was taken while this matter was meaningful to the defendants on trial. The news companies waited until the very last day of their 90 days to file the petition – when they knew that the July 10 order had lost meaning to us. They waited until a time when they could expect, at very least, only an academic interest by us in briefing and no wish at all to spend money and effort.

We pose this rhetorical question: if the issues are so vital to petitioners, why did they wait so long – to burden Mr. Simon and us at this sad time for him?

The news companies would prejudice Mr. Simon or us by their laches. They would force us to a meaningless appeal for Mr. Simon when all his small resources and our efforts should be spent towards the main event – his appeal.

We respectfully submit that the media petitioners should await the day when they are faced with a "gag" order again and a case where they act with "due diligence."

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[4] *See Nebraska Press Association v. Stuart*, 427 U.S. 539, 547 (1976).



2.

**Certiorari is not warranted: the decision in the Second Circuit was well-reasoned and right; and beyond, there were other good and sufficient reasons to keep the stay in place on appeal – no case or controversy, among them.**

We believe that the decision of the Court of Appeals for the Second Circuit was sound and followed precedent. Its rationale speaks well for itself.

Moreover, there were other reasons that made the result correct. Those reasons appear in the two extracts from the Argument section of our brief to the Court of Appeals that follow. In them, we dealt with two points overall – there never was a case or controversy in the Court of Appeals (and hence none here on review); the order was merited, narrowly drawn, precedent abiding and constitutional.

The Court should note (in considering our first extract) that the government was willing to live with the July 10 order and did.

* * *

[Extract No. 1]

THE NEWS COMPANIES LACK "STANDING" ON THIS APPEAL; FOR THEY DO NOT SATISFY THE INJURY-IN-FACT REQUIREMENT OF ARTICLE III OF THE UNITED STATES CONSTITUTION.

The news companies do not present a "case" or "controversy" under Article III of the United States Constitution and thereby lack "standing" to sue. Whatever "footing" they may have had was cut away by the litigating parties, when they either welcomed or accepted the July

10 order and did not appeal it. There are no willing speakers who feel throttled. Thus, there is no real injury or threat of real injury to the news companies caused by the July 10 order – as required by Article III. *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) and *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41 (1976)); *Laird v. Tatum*, 408 U.S. 1, 13 (1972); *United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984) (Scalia, J.). . . .

* * *

[Extract No. 2]

THE NEWS COMPANIES ARE NOT SUBJECT TO PRIOR RESTRAINT AND THE PRIOR RESTRAINT DOCTRINE AND ITS CONCOMITANTS ARE IRRELEVANT; UNDER THE PROPER "BALANCING" TEST THE JULY 10 ORDER PASSES CONSTITUTIONAL MUSTER.

Assuming for the nonce that the news companies have standing, they would still fail under the "balancing" test that protects whatever First Amendment rights they may have. Since they are not restrained, they do not properly invoke the "strict scrutiny" tests required by prior restraints on free speech. (Indeed, the news companies' interests are so shallow here that it is probably fair to say that there has been no infringement of any right of freedom of press.) When you weigh the private and public interests protected by the July 10 order as against the incidental First Amendment rights claim here, you come out handily on the side of upholding the order.



*No Prior Restraint*

The July 10 order sets no limit on what the news companies may print or show; they are in no danger of contempt. They can even print or display worldwide anything that is given to them by people who may be risking contempt. None of the media is denied access to a criminal trial or is restricted from disseminating any information about it. The July 10 order does not limit anyone from attending trial proceedings and to report anything that happens there. Nothing prevents the news companies from directing questions to trial counsel, defendants or to any of their agents.

In sum, there is no prior restraint on the media and prior restraint doctrine does not apply to the news companies' petition.

Analytically and in substance, there is a great difference between a restraining order against the press and a restraining order against trial participants. *See Radio & Television News Association v. United States District Court*, 781 F.2d 1443, 1446 (9th Cir. 1986); *Levine v. United States District Court*, 764 F.2d 590, 594 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986); *United States v. Alberico*, 604 F.2d 1315, 1320 n.15 (10th Cir.), *cert. denied*, 444 U.S. 992 (1979). Even the news companies' lead counsel here has recognized this in his earlier incarnation as a law review contributor – to some extent but not enough. *See* Sack, *Principle and Nebraska Press Association v. Stuart*, 29 Stan. L. Rev. 411, 426-27 (1977). A gag on a reporter is always dramatically different from a restraint on a source. It is much more intrusive – always. Moreover, the restraint on others here is of no great moment; no legal right is lost.

As we observed, the news companies have no right to demand that the trial counsel or defendants or any government official speak to them or leak information. They have no guarantee that anyone will speak to them. The rights of the media are no higher than those of the public – the rights essentially to sit, listen, watch and report on criminal trials and to ask questions if they will, but not to demand answers and unlimited speech from others. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978); *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972); *Radio & Television News*, 781 F.2d at 1446 (citing *KPNX Broadcasting Co. v. Superior Court of Maricopa*, 139 Ariz. 246, 678 P.2d 431 (1984)).

The fact that others could justly invoke the prior restraint concept does not help the news companies. They just have no standing to assert the rights of other people. *See In re "Agent Orange" Product Liability Litigation*, 96 F.R.D. 582, 584 (E.D.N.Y. 1983); *see also Levine v. United States District Court*, 764 F.2d at 594.

Thus, prior restraint doctrine and procedures do not govern this case. *See Nixon v. Warner Communications, Inc.*, 435 U.S. at 608-09; *Radio & Television News*, 781 F.2d at 1446; *Levine v. United States District Court, supra.*

*The Applicable Test*

Under these circumstances, where trial participants are not the challengers, the Ninth Circuit has ruled not only that prior restraint doctrine and procedures do not



apply but that "the media's collateral interest in interviewing trial participants is outside the scope of protection offered by the first amendment." *Radio & Television News*, 781 F.2d at 1447. It found that the desire to obtain information, which otherwise might be available, is insufficient "to establish an infringement of freedom of the press." *Id.*

The Ninth Circuit said, as a result, that it did not have to use "the strict scrutiny" required by a prior restraint and found on the authority of *Saxbe v. Washington Post Co.*, 417 U.S. 843, 849 (1974), no need to employ the "delicate balance" of government interest against First Amendment rights. *Radio & Television News*, 781 F.2d at 1447. The test that the Ninth Circuit saw was this:

> We need only "examine whether restrictions imposed are reasonable and whether the interests [of the government] override the very limited incidental effects of the [order] on First Amendment rights."

*Id.* (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 616 (1982)).

We are not certain whether the Ninth Circuit panel's reference to "delicate balance" was meant to suggest that "balancing" is the prior restraint test rather than the three-fold test urged here by the news companies and approved by the same panel in *Levine v. United States District Court*, 764 F.2d at 595 ((1) a clear and present danger or a serious and imminent threat to a protected interest, (2) a narrowly drawn order and (3) the unavailability of a less restrictive order from the opinion).

And we do not believe that this Court need or, indeed, ought to, adopt the notion that there is no infringement whatsoever (if it finds standing).

But what is clear and what analysis requires is that we are not in the prior restraint area and its rules of law; we are in the First Amendment area of (i) measuring competing private and public interests and (ii) pitting (if not "delicately balancing") them against each other in a limited access-restriction case.

The competing interests are also quite clear here.

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|---|---|---|
| (1)<br>Defendants' Sixth Amendment rights to a fair trial, hailed repeatedly as the most fundamental of civil rights. *Estes v. Texas*, 381 U.S. 532, 540 (1965). | | |
| (2)<br>The Court's concern and duty to supervise grand jury proceedings and secrecy. | vs. | A narrow, limited, incidental and oft-questioned right to gather news from willing speakers. |
| (3)<br>The Court's duties and concern about the fair administration of justice and the infringement on that by rampant, recent practices of government lawyers "trying cases in the media" before and during trials. | | |



Added to that equation are the pronouncements – even in prior restraint cases – that it is appropriate to impose greater restrictions on trial participants than on outsiders. *Sheppard v. Maxwell*, 384 U.S. 333, 360-63 (1966); *Nebraska Press Association v. Stuart*, 427 U.S. 539, 564 (1976).

*Applying the True Test*

Measuring and pitting competing interests lead to the result we urge – upholding the July 10 order.

First, the threat here against fair trial procedures is real and substantial – we would say even clearly and presently dangerous. Judge Cannella, upon ample evidence, found a "reasonable likelihood" that unrestrained attorneys and clients would prevent a fair trial. The prosecutors here had been quick funnels to the press of information about grand jury activity and their own investigations. They had led the news media into a rotunda for a press conference. They persistently had violated his April 23 order – even after a motion to bring on contempt proceedings was filed! The head prosecutors could not abide by ordered ground rules at a big press conference, which they had persuaded Judge Cannella to let them conduct. The demeaning and unfair publicity practices of state and federal prosecutors and knowledge of recent publicity rampages by the two prosecutors here, in New Haven (the *Stanley Friedman case*) and the Bronx (the Ex-*Secretary of Labor Ray Donovan case*), were before the District Court. And the April 23 order had put a modicum of good-sense concern into the prosecutors' publicity-seeking activity. There can be no serious question that, but for the April 23 order, press conference No.

2 would have been a reprise of no-holds-barred press conference No. 1. It might have been in a rotunda, too.

In putting in place the July 10 order, Judge Cannella was rightly influenced by the responsibility he had in this case to ensure control *early on* over possible prejudicial publicity as *required* of him by *Sheppard v. Maxwell*, 384 U.S. at 361-63. He would have been remiss on this record.

Second, the order was fully justified (i) as a sanction for grand jury violations and (ii) as a remedial precedent (as we urged) for the future to make the local prosecutors toe the mark. The July 10 order protects and furthers the governmental interest in grand jury secrecy and impartiality.

On the record before him, Judge Cannella was duty-bound to consider taking steps to protect the integrity of the grand jury system and balance it against First Amendment interests. *See Wood v. Georgia*, 370 U.S. 375 (1962) (First Amendment right balanced against the sanctity of a grand jury investigation); *see also Branzburg v. Hayes*, 408 U.S. at 682 (First Amendment right of news reporters weighed against integrity of grand jury system). The District Courts have broad supervisory power to supervise grand jury proceedings and must exercise it, particularly where there has been prosecutorial impairment of the grand jury's independent role. *United States v. Hogan*, 712 F.2d 757, 761 (2d Cir. 1983). In fact, the "exercise of the court's supervisory power can extend beyond the minimum requirements set by the Constitution to encourage fair and uniform procedures in the prosecution of criminal actions." *United States v. Vetere*, 663 F.



Supp. 381, 386 (S.D.N.Y. 1987) (citing *United States v. Jacobs*, 547 F.2d 772, 776 (2d Cir. 1976), *cert. granted*, 431 U.S. 937 (1977), *cert. dismissed*, 436 U.S. 31 (1978)). This Court has admonished district courts to ensure that prosecutors are particularly careful in presenting their cases to grand juries. *United States v. Hogan*, 712 F.2d at 759 (prosecutorial misconduct in presenting extensive hearsay, including a current newspaper clipping, before grand jury mandated dismissal of indictment). *Accord United States v. Serubo*, 604 F.2d 807, 816 (3d Cir. 1979).

Hence, the District Court can exercise its authority to impose an *"ad hoc* sanction" to enforce correct performance by government attorneys in presenting evidence to the grand jury. *Id.* Indeed, in *United States v. Vetere, supra*, the District Court exercised its supervisory power to dismiss an indictment where the grand jury was made privy to a ten-year old newspaper article. 663 F. Supp. at 386. And here, too, restraints on government's own agents and officers are particularly acceptable when justice is at stake. *See Sheppard v. Maxwell*, 384 U.S. at 361.

Third, turning to the broader aspect of the administration of justice, the insult to that "government interest" and the power and duty to protect and further it also lie here and help justify the July 10 order. The District Court has promulgated a rule – S.D.N.Y. Crim. R. 7(c) – that specifically allows for the kind of tailor-made order issued here in this highly "publicized" case. But up to this case, Rule 7(c) has largely "withered" although, ever increasingly, local federal prosecutors have systematized their public relations machine and have sung paeans to themselves in multi-media events at the expense of the investigated and the indicted – not the convicted. *See*

Association of the Bar of the City of New York, *Report of the Ad Hoc Committee on Pretrial Publicity* 3, 14 (1987). We have had one-sided "trials" in Foley Square and "convictions" at news conferences upon indictments; and dancing over the accused in the rotunda of the Bronx Courthouse. There is a fashion to this, and all the complaints of bar associations and bar leaders fall on the deafest ears and seem but to loose most active tongues.

Are the courts powerless? Do we – the lawyers – have no redress? We submit that Judge Cannella took a needed and long-overdue step towards a proper moderation. We dare suggest: some very good public servants may have learned the lesson he wanted to teach and we will all be better for the order here – if only to win respect for the system from the public, from defense counsel and from those charged with the heavy duty of prosecuting the accused.

Balanced against all these considerations in those three areas of "interests" is the most secondary right of "access." It is a gossamer here. The order is reasoned and reasonable. The only thing the press is barred from receiving *from the parties* are sensational characterizations and matters beyond the public record. The public will not be cheated by that limitation. The indictment is there. The court papers are there; we shall be appearing in open court saying things. You may take judicial notice that the news media have reported and will continue to report what appears in the papers filed in court and what is said in open court. The public – all those who could possibly care – knows what is going on and what will happen. It will surely know the results.



In the meantime, we can go about our lawyering without being assaulted (literally) on the courthouse stairs, without worrying what we should say to counter the Bronx District Attorney or the United States Attorney, without being concerned that "no comment" equals an admission of guilt and without dealing with the emotions of a "circus."

In sum, the July 10 order – no prior restraint on the news companies-appellants – was more than reasonable; it was prompted by compelling events and is salutary to the extreme. Its accomplishments in protecting and promoting important personal and "governmental interests" far outweigh any minor impingement on how the news companies go about their business.

We commend the July 10 order to you and respectfully suggest that overturning it would do a significant disservice to the administration of justice and would be a signal for some to unlearn quickly its lessons in moderation.